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No. 06-132

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In The
Supreme Court of the United States

KEVIN AND JULIA ANDERSON, DALE AND BETHANY DANIELS, LIONEL AND JILL GUAY III, STEPHEN AND SHARON JEROME, CHRISTINE KOZA, LAWRENCE AND KATHRYN RUGAN, MICHAEL AND JENNIFER VAN DER WERF, MICHAEL AND JERILYN WARD,

Petitioners,

v.

DURHAM SCHOOL DEPARTMENT, SUPERINTENDENT SHANNON WELSH, MINOT SCHOOL DEPARTMENT, SUPERINTENDENT ROBERT WALL, RAYMOND SCHOOL DEPARTMENT, SUPERINTENDENT SANDRA CALDWELL, MAINE DEPARTMENT OF EDUCATION, COMMISSIONER SUSAN GENDRON,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

REPLY TO OPPOSITION BRIEF OF THE STATE DEFENDANTS

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ARGUMENT

In opposing the petition for certiorari in this case Maine has pursued a strategy of obfuscation, deliberately obscuring the context in which the state introduced religious discrimination into a previously neutral statutory scheme. It has sought to muddy the water so that this Court will not confront the fact that Maine currently discriminates against families who choose religious schools for their children based upon a 25 year-old misunderstanding of the Establishment Clause. That misunderstanding arose in a 1980 Opinion of the Maine Attorney General, was implemented by the Maine Commissioner of Education for the 1980-81 school year, and was incorporated by the legislature into a comprehensive recodification of the Maine education statutes passed in 1982. Tacitly conceding that a mistaken interpretation of the Establishment Clause cannot supply even a rational basis for a statute that on its face discriminates on the basis of religion, the state seeks to avoid the conflict with decisions of this Court and other appellate courts that have held that when the actual rationale behind a statute is known speculative rationales should not be considered. Viewed in the proper context, no reasonable person can conclude that Maine excluded religious schools from petitioners' choice of schools for any reason other than a belief that such action was required to comply with the Establishment Clause.

Moreover, despite respondents' protestations that the decision below of the Maine Supreme Judicial Court ("SJC") is a simple application of this Court's recent decision in *Locke v. Davey*, 540 U.S. 712 (2004), and thus unworthy of this Court's attention, the decision is in fact a radical expansion of the narrow *Locke* decision into a sweeping carte blanche for religious discrimination. While *Locke* is replete with language limiting it to vocational training for the ministry and emphasizing that the program involved allowed students to attend religious colleges and take devotional religion courses, the decision below reads *Locke* and the Free Exercise and Establishment Clauses as permitting Maine to exclude all religious

schools and religious courses from parents choices. Far from remaining within *Locke*'s "play in the joints," the decision below dismembers the federal Religion Clauses.[1]

I. Respondents' Efforts To Avoid the *Weinberger v. Wiesenfeld* Question Presented in the Petition Fail.

The core of Respondents' argument for avoiding the implications of Maine's reliance on a mistaken understanding of the Establishment Clause to justify the removal of religious options from the tuitioning program is their claim that "there is not a thing in the legislative record indicating that the Legislature considered only the Establishment Clause." Respondents' Brief in Opposition (hereinafter "Opp. Br.") at 14. The best that can be said for this argument is that it is disingenuous, because the entirety of the circumstances, to say nothing of the plain language of the amended statute, show beyond the shadow of a doubt that it was the Attorney General's flawed Opinion in 1980 that resulted in the exclusion, with the Legislature subsequently incorporating that Opinion in the course of recodifying Maine's education statutes two years later. It is in fact the Respondents who have failed to provide even a scintilla of evidence that the following narrative and context is not completely accurate.

For a hundred years prior to the 1980-81 school year, families in petitioners' exact situation who sent their children to eligible religious high schools received the benefit of tuition payments made on behalf of their children.[2] Such

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[1] The First Circuit has also misread *Locke* as allowing unfettered discrimination against families selecting religious schools. *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004).

[2] Respondents' description of Maine's educational history is riddled with errors and mischaracterizations. Most prominent among them are the failures to acknowledge both that Maine had a long history of aiding the creation of religious private schools (at least Protestant ones) through the gift of state lands, a practice begun as part of Massachusetts and continued and encouraged after statehood in 1819 by the Maine Constitution's education article (art. VIII, pt.1, §1), and that its

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payments were routine, and there is no indication of any sort that excessive entanglement of the state with religion occurred. In 1979, however, while preparing a recodification of all of Maine's education laws, Senator Howard Trotzky, the chairman of the Joint Standing Committee on Education,[3] requested a legal opinion from the Maine Attorney General on whether it was legal to pay tuition to religious schools under several Maine statutes, then under review. The Attorney General issued a formal opinion concluding that the Establishment Clause prohibited Maine from contracting for school services with religious schools, an arrangement whereby a private high school serves as the de facto public school for the district.[4] This conclusion is plainly correct, but the Opinion went awry by failing to separately analyze the very different arrangement presented by the tuitioning program, in which parents independently choose a school for their children to attend, and by concluding that the Establishment Clause prohibited making tuition payments to religious schools under that program as well.[5] At that time, no decision of

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public schools were nondenominationally Protestant in orientation, with mandatory Bible reading, hymn singing, prayer, and baccalaureate exercises routine well into the Twentieth Century. Petition for Certiorari (hereinafter "Cert. Pet.") at 3 n.5 and sources cited therein.

[3] In an obvious effort to obscure the relationship between the Attorney General's 1980 Opinion and its subsequent incorporation into the recodification, Respondents refer to the chairman as simply "a Maine legislator," Opp. Br. at 3.

[4] Under such an arrangement all students from the contracting town must attend the private school with which the town's school board contracts. For a case from Maine involving such an arrangement, see *Logiodice v. Trustees of Maine Central Institute*, 296 F.2d 22 (1st Cir. 2002).

[5] Respondents persist in mischaracterizing this relationship as one of "direct public funding" of religious schools, Opp. Br. at 2, and of "direct use of public dollars for religious education." *Id.* at 26. Indeed, despite Maine's long history of providing grants of state lands directly to the founders of Protestant private schools, see n.2, Respondents state that "it is hard to imagine a more direct form of funding" than paying tuition to sectarian schools to educate petitioners' children by covering costs "the petitioners themselves would otherwise have to pay." Opp. Br. at 26-27 n.13. The beneficiaries of Maine's land grants were the schools,

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this Court forbade paying tuition to religious schools under a system of true private choice,[6] while two well-known decisions of this Court supported a finding of constitutionality. *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968). The Attorney General concluded that the various statutes involved had to be read as *sub silentio* excluding tuition payments to religious schools under both the contract and tuitioning statutes, despite their facial inclusion of religious schools and the long history of so interpreting the statutes.[7]

At the end of his Opinion the Attorney General stated his conclusion "that the practice of using public funds to send students to [sectarian] schools is unconstitutional."[8] Even before the Opinion was issued, however, the Record shows that the Attorney General met with the principal of a Catholic high school enrolling many students under the

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where as the beneficiaries of Maine's tuitioning program are the parents and children and not the schools that provide them an education in exchange for tuition payments, whether those payments are made by the parents or their school districts. When a government buys a service from a private provider of services the payments it makes are not "direct funding" of that provider, unless there is an element of gift to the service provider in the transaction.

[6] The primary case relied upon by the Maine Attorney General in his Opinion for the conclusion that districts could not pay tuition to religious schools pursuant to exclusive contracts specifically reserved judgment on the question of whether a program that "involv[ed] some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.38 (1973). Before the exclusion of religious schools, Maine's tuitioning program epitomized such a program, even more so than the Cleveland voucher program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which distinguished *Nyquist* on this very basis. *Id.* at 661.

[7] The Attorney General was well aware that districts were currently paying tuition for students attending religious schools. See Cert. Pet. at App. 74 n.2.

[8] Cert. Pet. at App. 97.

tuitioning system to tell him that such payments would be forbidden in the future.[9] The Record also shows that the Commissioner of Education applied the Opinion in the immediately following school year, 1980-81.[10]

Shortly thereafter, in 1982 Chairman Trotzky presented the recodification of Maine's education laws to the legislature. Section 2951(2) contained a new requirement never before found in the Maine code, and states that a private school can only be approved to receive public funds for tuition purposes if it "[i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." Having recently received the Attorney General's Opinion concluding the pre-existing statutes had to be interpreted to exclude tuition payments to sectarian schools, the conclusion is inescapable that the new language was added to make the new code correspond to the already altered practice of excluding sectarian schools. More importantly, the plain language of the new provision disqualifying otherwise eligible private schools that are sectarian explicitly references the First Amendment, an unmistakable reference to the Attorney General's legal conclusion to the same effect. Senator Trotzky, of course, was well aware that the change had already been implemented, and had already forced the closure of the Catholic high school in Bangor.

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[9] Affidavit of Joseph Sekera, ¶ 8, Joint Exhibit 4 to the Joint Stipulation of Facts, Tab 5 of App. Below. The Opinion forced the school to close. Cert. Pet. at 3-4. The Respondents softpedal this closure by saying the school "successfully transformed itself into a nonsectarian one." Opp. Br. at 4. Because he represented the Bangor area, Senator Trotzky was well aware of the effects of the Opinion he had solicited on John Bapst, see "Bangor Catholic School to Shut Down, Portland Press Herald, April 30, 1980, at 13; and David Himmelstein, "Only $2 Million Miracle Could Keep Bapst Going, Maine Sunday Telegram," May 4, 1980, at A14, and is quoted as regretting that his request for the Opinion was causing the school to close.

[10] Affidavit of James Watkins, Jr. ¶ 29, Joint Exhibit 5 to the Joint Stipulation of Facts, Tab 5 of App. Below.

Respondents are indeed correct that the legislative history of the 1982 recodification by Maine Legislature does not indicate that the Legislature "considered only the Establishment Clause." That, however, is not the relevant fact. The relevant fact is that the Maine Legislature *intended absolutely no substantive change in the statutes.* There was no need for them to consider any rationales for the new provision or any other, because the purpose of the recodification was solely to reflect existing law and *not* to make new law. On this point the legislative history is *unequivocal* and *utterly consistent.*

As chairman of the Joint Standing Committee on Education, Senator Trotzky introduced and defended the recodification in the state Senate. His remarks left no doubt that the education committee intended that the recodification make no substantive changes whatsoever to existing law, but merely systematize and update the hodge-podge of current education laws.[11] His House counterpart, Representative Connolly, chairman of the House Education Committee, stated the same thing in the other chamber: "the Education Committee [meant] to make [no] substantive changes at all in this recodification."[12] Representative Thompson, another member of the House Education Committee, stated that all members of the committee agreed that the recodification makes no substantive changes.[13] Representative Murphy, also a member of the House Education Committee, assured the House that during the drafting process any proposed change that any member of the public thought would possibly change meaning was left in its original language.[14] Indeed, when the issue of how § 2951(2) came to be in the statutes became a bone of contention during the 2003 debate to repeal it, yet another member of the House Education

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[11] 1982 Me. Leg. Rec. 483-84, 533-34 (Senate, March 31, 1982 and April 1, 1982).

[12] *Id.* at 315, 539-40 (House, March 23, 1982 and April 5, 1982).

[13] *Id.* at 539 (House, April 5, 1982).

[14] *Id.* at 315 (House, March 23, 1982).

Committee from 1982 came forward to explain that the change was "done in strict concurrence with the Attorney General's recommendations" in his Opinion.[15]

In summary, because the legislature was engaged in a recodification of the entire education code, its concern was with accurately reflecting current law and practice, not writing new substantive law. It had no occasion to consider additional rationales for taking away parents' rights to choose religious schools when excluding such schools from participation in the tuitioning system, because that was not its mission. By 1982 it accepted as a given, a fait accompli, the exclusion of such schools pursuant to the 1980 Attorney General's Opinion and its implementation by the Department of Education. The deed was already done.

Accordingly, because of the particular circumstances and context surrounding the exclusion of religious schools from the tuitioning program, it is clear that the exclusion was a function of the 1980 Attorney General's Opinion and based upon his conclusion that such an exclusion was required by the Establishment Clause. The actual reason for the exclusion is in fact known, and under this Court's decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), it was unnecessary for Petitioners to negate every conceivable justification for the exclusion, whether actually considered or not. As a result, Respondents' reliance on *F.C.C. v. Beach Communications*, 508 U.S. 307 (1993), is misplaced, and the question of whether the SJC's decision below properly applies *Weinberger* is appropriately presented for this Court to review.

II. The SJC's Reliance on Excessive Entanglement as a Rationale Is Inappropriate.

Respondents fault Petitioners for "persist[ing] in characterizing" the program as one of indirect funding of religious schools. Opp. Br. at 26 n.13. In so doing, Respondents

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[15] Transcript of House Debate on LD 182 at H-589 (May 13, 2003) (remarks of Rep. Millett), App. Below at 176.

perpetuate an error from the original 1980 Attorney General's Opinion and from both of the SJC's decisions involving recent challenges to the discriminatory exclusion.[16] This is the failure to properly recognize that even though tuition payments are transmitted directly to schools participating in the tuitioning program, they are of, at most, indirect benefit to the schools. That is nowhere more clearly illustrated than by the situation in which the Petitioners find themselves. They currently pay tuition for their children's education in schools that participated in the program prior to being ejected in 1980. Should petitioners prevail in this lawsuit, the schools will not receive any more tuition than before, but the school districts rather than the parents would be paying the tuition. The parents are the true beneficiaries of the programs, and the true victims of the discrimination based on religion that § 2951(2) represents.

A consequence of the failure of the original 1980 Opinion and of the SJC's decision below to recognize that the parents are the parties directly benefited by the tuition payments is that this failure leads them to believe that the Establishment Clause's concern with excessive entanglement is relevant to evaluating the constitutionality of inclusion of religious schools. In the leading case addressing excessive entanglement, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), relied upon by Respondents,[17] this Court found that a program that provided *institutional* aid to religious schools would have to police such aid to ensure that it did not have the effect of subsidizing the religious aspects of the schools educational program.[18] Programs of

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[16] In addition to the decision below, the SJC addressed this program in *Bagley v. Raymond School Dist.*, 728 A.2d 127 (Me.), *cert. denied*, 28 U.S. 931 (1999).

[17] Opp. Br. at 27.

[18] The aid in *Lemon* is institutional because it went to defray costs for which the institution was responsible, teacher salaries. The *Lemon* program sought to avoid benefiting the religious aspects of the schools by limiting its subsidies to secular subjects only, but this Court found that the pervasive monitoring that would be necessary to ensure that

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true parental choice, however, which Maine's tuitioning program epitomizes, do not have to contain such policing mechanisms, nor did the program contain such mechanisms during the century that religious schools could be chosen. The fact that the SJC and some current legislators may think such mechanisms would be required simply means that they do not understand the correct meaning of "excessive" entanglement. Indirect aid programs upheld by this Court have never contained pervasive monitoring mechanisms. *Everson v. Board of Education,* 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist. No. 1*, 509 U.S. 1 (1993); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

III. The Decision Below Is A Radical Expansion of *Locke*.

Respondents argue that the SJC's application of *Locke v. Davey*, 540 U.S. 712 (2004), is utterly routine. They believe that despite repeated and continual references in the decision to post-secondary vocational education for the clergy, the discussion of the historical background to concerns with vocational education for the clergy, and language stressing the narrowness of the decision, "there is nothing in that decision even hinting that the underlying analysis" is limited to vocational education for the clergy. Opp. Br. at 21. If Respondents and the SJC are correct in their reading that *Locke* extends beyond vocational education for the clergy, then it is clear that this Court has truly created a monster, and given states carte blanche to discriminate against religious education in general.

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no religion was involved in the teaching of secular subjects would excessively entangle the state authorities with the religious schools. Maine's tuitioning program, by way of contrast, defrays costs for which the parents rather than the school are responsible, and requires no such monitoring of the educational program to ensure no religious elements are subsidized.

Throughout this litigation, Petitioners have asked a simple hypothetical, to which they have yet to receive a satisfactory answer. If it would violate the Free Exercise Clause for Maine to refuse to provide tuition payments on behalf of families choosing Catholic schools and only Catholic schools, because that would plainly discriminate against Catholics on the basis of their religion, why does it not also violate the Free Exercise Clause to discriminate against all families selecting religious schools because they have selected a religious school? The SJC's decision below reads *Locke* as authorizing just this sort of generic discrimination against religion and individuals given an otherwise free choice of private or public schools for their children. If this is correct then states may freely exclude students attending religious schools from any general education-related benefit programs, even though such exclusions are not required by the Establishment Clause. If *Locke* has any limit at all, it must not allow exclusion of religious options from a program like tuitioning that would otherwise be the epitome of religious neutrality. Neither the Establishment Clause nor the Free Exercise Clause permit such widespread discrimination against religion. If this Court's "play in the joints" metaphor has any meaning, there must be a limit to how loose the joint can be.

CONCLUSION

Despite Respondents' efforts to confuse the context in which this case arose, the Petition properly presents its two issues for this Court's resolution. Accordingly, Petitioners respectfully request this Court grant their Petition for Certiorari.

Respectfully submitted,

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